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FEDERAL TRADE COMMISSION

16 CFR Part 316

RIN 3084-AB38

CAN-SPAM Rule

AGENCY: Federal Trade Commission (“Commission” or “FTC”).

ACTION: Rule Review; Request for public comments.

SUMMARY: The Commission is requesting public comments on its rule implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act (the “CAN-SPAM Rule” or “Rule”). The Commission is soliciting comments about the efficiency, costs, benefits, and regulatory impact of the Rule as part of its systematic review of all current Commission regulations and guides. All interested persons are hereby given notice of the opportunity to submit written data, reviews, and arguments concerning the Rule.

DATES: Written comments concerning the CAN-SPAM Rule must be received no later than August 31, 2017.

ADDRESSES: Interested parties may file a comment online or on paper, by following

the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Write: “CAN-SPAM Rule, 16 CFR Part 316, Project No. R711010,” on your comment, and file your comment online at

<https://ftcpublic.commentworks.com/ftc/canspamrulereview> by following the instructions on the web-based form. If you prefer to file your comment on paper, write “CAN-SPAM Rule, 16 CFR Part 316, Project No. R711010,” on your comment and on the envelope,

and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Christopher E. Brown, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-2825.

SUPPLEMENTARY INFORMATION:

I. Background

Enacted in 2003, and effective since January 1, 2004, the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act” or “Act”),¹ regulates the transmission of all commercial electronic mail (“email”) messages. The Act specifically prohibits certain commercial email acts and practices² and establishes specific requirements for the content of these messages³ to ensure that recipients have the right to opt out of receiving them.⁴ The Act explicitly directed the Commission to issue regulations “defining the relevant criteria to facilitate the determination of the primary

¹ 15 U.S.C. 7701-7713.

² Section 7704(a)(1) of the Act prohibits transmission of any email that contains false or misleading header or “from” line information. Section 7704(a)(2) prohibits the transmission of commercial email messages with false or misleading subject headings.

³ Section 7704(a)(5) prohibits the initiation of a commercial email message unless it contains three disclosures: (1) clear and conspicuous identification that the message is an advertisement or solicitation; (2) clear and conspicuous notice of the opportunity to decline to receive further commercial email messages from the sender; and (3) a valid physical postal address of the sender.

⁴ Section 7704(a)(3) requires that a commercial email message contain a functioning return email address or similar Internet-based mechanism for recipients to use to “opt out” of receiving future commercial email messages. Section 7704(a)(4) prohibits the sender, or others acting on the sender’s behalf, from initiating a commercial email to a recipient more than ten business days after the recipient has opted out.

purpose of an electronic mail message.”⁵ The Act also mandated that the “Commission in consultation with the Attorney General shall prescribe clearly identifiable marks or notices to be included in or associated with commercial electronic mail that contains sexually oriented material, in order to inform the recipient of that fact and to facilitate filtering of such electronic mail.”⁶ In addition to these mandatory rulemakings, the Act also provides discretionary authority for the Commission to issue regulations concerning certain of the Act’s other definitions and provisions.⁷

Pursuant to the Act’s directive, the Commission promulgated a rule styled the Label for Email Messages Containing Sexually Oriented Material (“Adult Labeling Rule”) in 2004.⁸ The Adult Labeling Rule provides that, any person who initiates, to a protected computer, the transmission of a commercial email that includes sexually oriented material must: (1) exclude sexually oriented materials from the subject heading and include in the subject heading of that email the phrase “SEXUALLY-EXPLICIT: ”; and (2) provide that the content of the email message that is initially viewable when the message is opened include only certain specified information, and not include any sexually oriented materials.⁹ The Adult Labeling Rule also exempts situations where a recipient has given his or her prior consent to receipt of a sexually oriented message.¹⁰

⁵ 15 U.S.C. 7702(2)(C). The Act authorizes the Commission to use notice and comment rulemaking pursuant to the Administrative Procedures Act, 5 U.S.C. 553. 15 U.S.C. 7711.

⁶ 15 U.S.C. 7704(d)(3).

⁷ 15 U.S.C. 7702(17)(B); 7704(c)(1)(A)–(C); 7704(c)(2); 7711(a).

⁸ *Federal Trade Commission: Label for E-mail Messages Containing Sexually Oriented Material; Final Rule*, 69 FR 21024 (Apr. 19, 2004).

⁹ 16 CFR 316.4 (a). The Adult Labeling Rule was originally numbered section 316.1 when it was promulgated on April 19, 2004. In the August 13, 2004, Notice of Proposed Rulemaking, the only change proposed to the Adult Labeling Rule was to renumber it as section 316.4. The Commission requested comment on this proposed change and did not receive any responsive comments.

¹⁰ 16 CFR 316.4(b).

In 2005, the Commission issued CAN-SPAM Rule provisions that define the relevant criteria to determine the “primary purpose” of an email message.¹¹ To facilitate this determination, the Rule describes four categories of messages—(1) messages that contain only commercial content, (2) messages that contain both commercial content and “transactional or relationship content,” (3) messages that contain both commercial content and content that is neither commercial nor “transactional or relationship,” (4) messages that contain only “transactional or relationship content”—and provides criteria for determining the primary purpose of such email messages.¹² Under the Rule, if an email message contains only commercial content, the “primary purpose” of the message shall be deemed to be commercial.¹³ Similarly, if an email message contains only transactional or relationship content, the “primary purpose” of the message shall be deemed to be “transactional or relationship.”¹⁴ If an email message contains both commercial content and transactional or relationship content, then the primary purpose of the message shall be deemed to be commercial if: (1) a recipient reasonably interpreting the subject line of the email message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or (2) the email message’s transactional or relationship content does not appear, in whole or in substantial part, at the beginning of the body of the message.¹⁵ In addition to the subject line criterion applicable to all dual-purpose messages, the Rule also describes another criterion to determine the primary purpose of a message that contains commercial content

¹¹ *Federal Trade Commission: Definitions and Implementation Under the CAN-SPAM Act; Final Rule*, 70 FR 3110 (Jan. 19, 2005).

¹² 16 CFR 316.3.

¹³ 16 CFR 316.3(a)(1).

¹⁴ 16 CFR 316.3(b).

¹⁵ 16 CFR 316.3(a)(2).

and content that is neither commercial nor “transactional or relationship” in nature.¹⁶ In such a case, the primary purpose of the message still would be deemed “commercial” if a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. The Rule lists several factors relative to this inquiry, including the placement of content that advertises or promotes a product or service at or near the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.¹⁷

The Rule also clarifies that the definitions of certain terms taken from the Act and appearing in the Rule are prescribed by particular referenced portions of the Act. These terms include: “affirmative consent,” “commercial electronic mail message,” “electronic mail address,” “initiate,” “Internet,” “procure,” “protected computer,” “recipient,” “routine conveyance,” “sender,” “sexually oriented material,” and “transactional or relationship message.”¹⁸ The Rule also includes a severability provision that provides that if any portion of the Rule is found to be invalid, the remaining portions will survive.¹⁹

Pursuant to its discretionary authority to issue regulations to implement the provisions of the Act, the Commission promulgated additional CAN-SPAM Rule provisions in 2008. These provisions: (1) add a definition of the term “person;” (2) modify the term “sender” in those instances where a single email message contains advertisements for the products, services, or websites of multiple entities; (3) clarify that

¹⁶ 16 CFR 316.3(a)(3).

¹⁷ 16 CFR 316.3(a)(3)(ii).

¹⁸ 16 CFR 316.2(a), (c) – (n).

¹⁹ 16 CFR 316.6. The severability provision was previously numbered section 316.5 when it was promulgated in January 19, 2005, and applies to the entire Final Rule.

a sender may comply with section 7704(a)(5)(A)(iii) of the Act by including in a commercial email message a post office box or private mailbox established pursuant to United States Postal Service regulations; and (4) clarify that to submit a valid opt-out request, a recipient cannot be required to pay a fee, provide information other than his or her email address and opt-out preferences, or take any steps other than sending a reply email message or visiting a single page on an Internet website.²⁰

II. Regulatory Review of the CAN-SPAM Rule

The Commission periodically reviews all of its rules and guides. These reviews seek information about the costs and benefits of the agency's rules and guides, and their regulatory and economic impact. The information obtained assists the Commission in identifying those rules and guides that warrant modification or rescission. Therefore, the Commission solicits comments on, among other things, the economic impact and benefits of the Rule; possible conflict between the Rule and state, local, or other federal laws or regulations; and the effect on the Rule from any technological, economic, or other industry changes since promulgation of the Rule.

III. Issues for Comment

The Commission requests written comment on any or all of the following questions. The General Questions reflect those traditionally raised at such a review. The Specific Questions are based on the CAN-SPAM Act's express grant of specific or supplementary rulemaking authority.²¹ All questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted. The Commission requests that responses to its questions be as specific as

²⁰ *Federal Trade Commission: Definitions and Implementation Under the CAN-SPAM Act; Final Rule*, 73 FR 29654 (May 21, 2008).

²¹ See 15 U.S.C. 7702(17)(B) and 7704(c)(1)-(2).

possible, including a reference to the question being answered, and reference to empirical data or other evidence upon which comments are based whenever available and appropriate.

A. General Issues

1. Is there a continuing need for the Rule? Why or why not?
2. What benefits has the Rule provided to consumers? What evidence supports the asserted benefits?
3. What modifications, if any, should be made to the Rule to increase its benefits to consumers?
 - (a) What evidence supports the proposed modifications?
 - (b) How would these modifications affect the costs the Rule imposes on businesses, including small businesses?
 - (c) How would these modifications affect the benefits to consumers?
4. What impact has the Rule had on the flow of truthful information to consumers and on the flow of deceptive information to consumers?
5. What significant costs, if any, has the Rule imposed on consumers? What evidence supports the asserted costs?
6. What modifications, if any, should be made to the Rule to reduce any costs imposed on consumers?
 - (a) What evidence supports the proposed modifications?
 - (b) How would these modifications affect the benefits provided by the Rule?
7. What benefits, if any, has the Rule provided to businesses, including small businesses? What evidence supports the asserted benefits?

8. What modifications, if any, should be made to the Rule to increase its benefits to businesses, including small businesses?

(a) What evidence supports the proposed modifications?

(b) How would these modifications affect the costs the Rule imposes on businesses, including small businesses?

(c) How would these modifications affect the benefits to consumers?

9. What significant costs, if any, including costs of compliance, has the Rule imposed on businesses, including small businesses? What evidence supports the asserted costs?

10. What modifications, if any, should be made to the Rule to reduce the costs imposed on businesses, including small businesses?

(a) What evidence supports the proposed modifications?

(b) How would these modifications affect the benefits provided by the Rule?

11. What evidence is available concerning the degree of industry compliance with the Rule?

12. What modifications, if any, should be made to the Rule to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?

13. Does the Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how?

(a) What evidence supports the asserted conflicts?

(b) With reference to the asserted conflicts, should the Rule be modified? If so, why, and how? If not, why not?

B. Specific Issues

1. Should the Commission modify the Rule to expand or contract the categories of messages that are treated as transactional or relationship messages?

(a) Why or why not?

(b) What evidence supports such a modification?

(c) How would this modification affect the costs the Rule imposes on businesses, including small businesses?

(d) How would this modification affect the benefits to consumers?

2. As discussed above, the Rule tracks the CAN-SPAM Act in prohibiting the sending of commercial email to a recipient more than ten business days after the recipient opts out. Should the Commission modify the Rule to reduce the time-period for processing opt-out requests to less than ten business days?

(a) Why or why not?

(b) What evidence supports such a modification?

(c) How would this modification affect the costs the Rule imposes on businesses, including small businesses?

(d) How would this modification affect the benefits to consumers?

3. Should the Commission modify the Rule to specify additional activities or practices that constitute aggravated violations?

(a) Why or why not?

(b) What evidence supports such a modification?

(c) How would this modification affect the costs the Rule imposes on businesses, including small businesses?

(d) How would this modification affect the benefits to consumers?

IV. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 31, 2017. Write “CAN-SPAM Rule, 16 CFR Part 316, Project No. R711010,” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at <https://www.ftc.gov/policy/public-comments>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at: <https://ftcpublic.commentworks.com/ftc/canspamrulereview>, by following the instructions on the web-based form. If this Notice appears at <https://www.regulations.gov/#!home>, you also may file a comment through that website.

If you prefer to file your comment on paper, write “CAN-SPAM Rule, 16 CFR Part 316, Project No. R711010” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Website at <https://www.ftc.gov>, you are solely responsible for making sure that your comment does not include any sensitive personal information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number, financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential" – as provided in section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Website – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from the FTC Website, unless

you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 31, 2017. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

Donald S. Clark
Secretary.

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